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THE LAW OF DÁMDUPAT IN INDIA.

The rule of *dámdupat*, a word which we owe to the Bombay lawyers, in whose Presidency the doctrine has more extensive applicability and has received more developments than in any other, is a rule of Hindu law, resting, like most such rules, upon a combination of old Hindu texts with their commentaries and modern judicial decisions extending and adapting them to the exigencies of new circumstances. Three questions arise with regard to it, *viz.*: (1) What is the law of Dámdupat ? (2) Between what people is it applicable ? and (3) Is it in force in this country under the enactments in force or the practice prevailing in it, and if so, in what places ? These questions must be separately considered.

The rule of *dámdupat* may be summarised in the words of S. 12 of Bombay Regulation, V of 1827, as limiting the interest on money to the amount of the principal. From this succinct statement of the rule, various questions arise. Does 'interest' mean the arrears of unpaid interest or does it include previous payments also? Does 'principal' similarly mean "the balance of principal due or the amount of the original loan"? Does it apply in cases not of mere loans, but of pledges and mortgages, and if so, does it apply when the creditor is charged with the rents and profits of the property mortgaged ? Does again the rule affect interest subsequent to the date of the plaint or of the decree ? For the proper elucidation of these points, a consideration of the ancient texts is necessary.

The principal text is that of *Manu* who speaking of interest says:—

Ch. VIII. 140. 'A lender of money may take in addition to his capital the interest allowed by *Vasishtha*, that is, an eightieth part

of a hundred, or one and a quarter by the month, if he have a pledge. 141. Or if he have no pledge, he may take two in the hundred by the month, remembering the duty of good men; for by thus taking two in the hundred, he becomes not a sinner for gain." Again,

151. "Interest on money received at once (not year by year, month by month or day by day, as it ought) must never be more than enough to double the debt (that is, more than the amount of the principal paid at the same time.)

152. On grain, on fruit, on wool or hair, on beasts of burden (lent to be paid in the same kind of equal value) it must not be more than enough to make the debt quintuple.

153. Stipulated interest beyond the legal rate and differing from the (preceding) rule, is invalid; and the wise call it an usurious way of lending."

The words in brackets are the gloss of *Kulluka*. *Vishnu* says, Ch. VI, 11 :—"On precious metals or gems the interest shall rise no higher than to make the debt double." *Gautama*, Ch. XII, 31 :—"If the loan remains outstanding for a long time, the principal may be doubled (after which interest ceases). 36. The interest on products of animals, on wool, on the produce of a field and on beasts of burden, shall not increase more than five-fold the value of the object lent." *Brihaspati*, Ch. XI, 13 :—"On the precious metals or gems, the interest may make the debt double." *Katyayana* :—"For gems, pearls and coral, for gold and silver, the interest stops when it doubles the debt." And *Yajnavalkya*, Ch. II, 39 :—"The utmost increase [a creditor can lawfully exact from his debtor] consists in the case of female beasts, of their progeny; in the case of fluids, of their eight-fold; in the case of cloth, corn and gold, of their four-fold, three-fold and two-fold (respectively.)" The words 'precious metals,' 'gold' and 'silver' in the above passages refer to money and they are quoted as so referring in the Vyavahara Mayukha, Ch. V, Sec. 11, Ss. 6, 7, which is in its turn quoted with approval by the Bombay High Court in *Khushalchand* v. *Ibrahim*, 3 Bom., A. C., 23.

Thus, no interest, legal or stipulated, could be taken beyond the prescribed rate; and interest could not exceed principal in the

case of money lent, and certain other fixed proportions in the case of other goods. Commenting on Manu's verse, 151, quoted above. *Vijnaneswara* says :—*Received at once;* another reading is *lent at once.* Money so lent can only be doubled; but recovered from one person and lent to another, it may be more than doubled. On the first reading, *sakrīdáhrítá,* 'received at once' the text should thus be expounded :—'interest on money, received by degrees, day by day, month by month, or year by year, may be doubled.' The second reading conveys what is almost a truism, namely, that while a person cannot recover more than double the debt from one person, he may by successive loans to different persons more than double his original principal. On the first reading, previous part-payments of interest are not to be taken into consideration in applying the rule of *dámdupat.* *Raghunandana* is to the same effect :—Vyavahara Mayukha, Ch. V, S. 11, Ss. 6, 7," "But in any case where it (interest) is realized (by degrees) or at various times also, more than the legal or allowable interest may be levied, according to *Vijnaneswara* and other authorities." And it was so expressly decided in *Dhondu* v. *Narayan,* I. L. R., 1 B., 47, on a review of the above authorities and overruling the previous decisions of the Sudder Court.

The converse case is where part-payments of principal have been made, when the question arises whether interest should be *limited to* the balance of principal or the original loan. There is a paucity of ancient authority on the subject. 'The sages of Hindu law did not foresee every case that might arise; and probably left this question to be decided by the judges, who give weight to the general spirit of the law, including regard to custom and equity.' Per *Jardine,* J., in I. L. R., 20 B., 612. While the text of *Manu* itself speaks ambiguously of 'principal,' the gloss of *Kulluka* explains it as meaning principal paid at one and the same time,' that is, the balance of 'principal'; In *Kakarlapudi* v. *Uppalapadi*, 1 M. H. C. R., 5, the original loan was Rs. 2,042-0-10, part-payments had been made from time to time and credited towards the principal: the balance of principal due was Rs. 617-0-10 and interest Rs. 2,350-3-3. The lower Court allowed both these sums in full. But on appeal, the High Court restricted the amount of recoverable interest to the original principal, *viz.,* Rs. 2,042-0-10.

The *actual* decision was no doubt given under S. 4 of Madras Regulation 34 of 1802 which enacted that 'where interest on debts or on money lent may have accumulated so as to exceed the principal money, the Courts of Adawlut shall not decree a greater sum for interest than the amount of such principal money.' But as the expression 'principal money' is ambiguous and as the Regulation was intended to embody the Hindu law on the subject, this case may be taken to be an authority on that law as well. In *Dagdusa* v. *Ramachandra*, I. L. R., 20 B., 611, the plaintiff sued upon an instalment bond, under which many instalments had been punctually paid *but the rest not.* The interest on the unpaid instalments exceeded the total amount of those instalments, but was less than the original loan. It was held that the plaintiff was not entitled to recover interest exceeding the balance of principal actually due at the time the debt was sued for.

The actual decision in this case may no doubt be supported on the ground that a number of the instalments under the bond sued upon having been duly paid, no interest began to accrue until the date of default and the principal money in these circumstances was the amount on which the interest accrued, that is, the amount of the instalments due. So far as the case goes beyond this, it is open to serious question. *Ranade*, J., in his judgment in that case relies much upon 'the explanatory words' in the text of *Manu*: but they are only the gloss of *Kulluka* unsupported by any authority. *Manu* qualifies 'interest on money' by the words 'received at once' and the absence of similar words with regard to 'principal' may not improperly lead to the inference that it was not intended to be so qualified. *Shri Ganesh Dharnidar* v. *Keshavrav*, I. L. R., 15 B., 624, quoted by the learned Judge as supporting his view, does not appear, even after careful examination to have at all touched the question, as it proceeded upon the assumption that the whole of the receipts was to be credited towards interest. On the other hand, the words of *Telang*, J., 'the ground of equity on which that rule rested does not justify a decree in favor of the mortgagee for more than double the amount *actually advanced*' show that the limit of interest in the learned Judge's mind was the amount advanced and not the balance due. The case in 1 M. H. C. R., 5, is again quoted by *Ranade*, J., as restricting interest recoverable to the balance of principal due, where part-payments of principal have been

made, while, as we have seen, it decides that interest equal to the original principal may be recovered. Another argument of the learned Judge is that the exclusion of the *dámdupat* rule in cases of mortgages where the rents and profits have to be set off against interest and principal, and its limitation to cases where the account has to be taken only on one side, are based upon the consideration that interest should not exceed the balance of unpaid principal. It is difficult to see how it is so. It must be remembered that when rents and profits are appropriated to principal and interest, interest will be first cleared, before appropriation is made to the principal. In such a case, the rule that interest should not exceed the balance of principal can work no more hardship to the creditor than in the case of ordinary loans and does not necessitate the exclusion of the *dámdupat* rule. According to the learned Judge's interpretation, a creditor, for instance, receiving payment of the principal can never after recover the interest, as the balance of principal becomes *nil.* Instead of relieving debtors, as the learned Judge supposes, the only effect of such a rule would be to make creditors *chary* of accepting part-payments of principal to make it run on to the prejudice of the debtors.

The next question is whether the rule of *dámdupat* is applicable to pledges and mortgages. In *Narayan* v. *Gangaram*, 5 B. H. C., 157, the rule was held not to apply to pledges and mortgages, it having been so held on several previous occasions in the same Court. But in *Nathubai* v. *Mulchand*, 5 B. H. C., 196, this was dissented from and the rule was held to apply to all mortgage-debts where no account of rents and profits had to be taken; but it was held that 'where there is an account of rents and profits to be taken, it would be inequitable that interest should cease when it amounts to the same sum as the principal, if the rents and profits continue to be charged' and that in such a case the rule was excluded. Since this case the first proposition laid down in it has been settled law in all the Presidencies. (*Nobin Chunder Bannerjee* v. *Romesh Chunder Ghose*, I. L. R., 14 C., 788; *Balkrishna Babaji* v. *Hari Govind*, *Ib.* 15 B., 84; *Ram Kanye* v. *Cally Churn Dey*, *Ib.* 21 C., 841; *Lall Behary Dutt* v. *Thacomoney Dassee*, *Ib.* 23 C., 906; *Gopal Ramchandra* v. *Gangaram Anand She*, per *Candy*, J., in *Ib.*, 20 B., 725.) The second proposition also was uniformly followed

(*Narayan* v. *Satvaji*, 9 B. H. C., 83, and cases quoted in I. L. R., 20 B., 728), until in *Shri Ganesh Dharvidar* v. *Keshavray*, I. L. R., 15 B., 625, *Telang*, J., introduced an exception to it by laying down that even where an account of rents and profits has to be taken, the *dámdupat* rule has application, if after adding interest to the principal amount advanced at the rate stipulated in the mortgage and appropriating the rents and profits received by him in or towards satisfaction of such interest, there remains interest payable on foot of the mortgage exceeding the principal. 'The ground of equity on which that rule (in *Nathubai* v. *Mulchand*) is rested does not justify a decree in favor of the mortgagee for more than double the amount actually advanced; it only prevents the rents and profits being deducted from the amount so doubled.... In truth, what the Court in *Nathubai* v, *Mulchand* spoke of, as a restriction on the application of the rule of Hindu Law, may fairly be looked upon as no restriction at all, but an enforcement of it in the form laid down in *Dhondu* v. *Narayan*. For each item of rents and profits received by the mortgagee can properly be regarded as a payment by the mortgagor and the rule of *dámdupat* as expounded in *Dhondu* v. *Narayan* places no limitation on the aggregate of such payments. It is only when the final payment comes to be made in satisfaction of the whole mortgage-debt that there is room, in such a case as the present, for the application of that rule." But a Full Bench of the Bombay High Court has recently overruled this decision as being inconsistent with the judgment in *Nathubai* v. *Mulchand* as uniformly understood and acted upon since 1868 and has laid down that the rule of *dámdupat* has no application in cases in which the terms of the mortgage necessitate the existence of an account current between mortgagor and mortgagee, whatever the state of such account may be.

It is clear from the ancient law-givers that they intended the rule of *dámdupat* to apply to pledges and mortgages. ***Brihaspati*** says "When land or other (immoveable property) has been enjoyed, and more (than the principal debt) has accrued therefrom, then the principal and interest having been realized, the debtor shall obtain his pledge. *Yajnavalkya*":—"Whenever a debt under mortgage has become doubled by interest, then the pledge shall certainly be returned whenever double the sum lent has been

received." It is difficult to construe these texts, but they seem to mean that on no account can the creditor in possession of mortgaged lands make more than double the amount of principal out of them. But the long course of decisions in Bombay is contrary to such an interpretation and is likely to be followed by the Madras and Calcutta High Courts. But it is a matter of doubt whether they will adopt the view taken by *Telang*, J., in I. L. R., 15 B., 625, or that of the Full Bench in I. L. R., 20 B., 721. Where the mortgagee takes possession not by virtue of the deed itself, but by the power inherent in a mortgagee to take possession, the ruling in I. L. R., 20 B., 721, would not apply as the terms of the mortgage do not necessitate the existence of an account current. The rents and profits collected would be part-payments of interest within the meaning of *Dhondu* v. *Narayan*, according to the reasoning of *Telang*, J., in *Shri Ganesh Dharnidar* v. *Keshavrav*, and the ruling of that learned Judge would, it is surmised, be applicable.

Where there is a mutual, open and current account between the parties, it is a matter of doubt whether the rule of *dámdupat* will apply. Whether it is the original principal or the balance of it that the interest is held not to exceed, the application of the rule would produce much hardship.

In *Balakrishna* v. *Gopal Ramchandra*, I. L. R., 1 B., 73, the plaintiff obtained a money-decree with interest. After some years he applied for execution, when the interest payable under the decree was in excess of the principal sum and the question was whether under the *dámdupat* rule he could recover the excess. The Court held that the rule did not apply to interest recoverable in execution. In I. L. R., 14 C., 781, the rule was applied to interest both before and during the period of six months allowed for redemption, notwithstanding the form of the decree. In I. L. R., 21 C., 841, the usual mortgage decree was passed and accounts were directed to be taken. In taking the accounts, the Registrar applied the rule of *dámdupat* and accordingly issued his certificate. When the property was sold, the plaintiff applied for payment out of the sale-proceeds of the sum mentioned in the certificate with interest thereon at 6 per cent. It was held that the rule having once been applied, no further interest could be allowed notwithstanding the form of the decree. In I. L. R., 23 C., 906, the facts were the same, but the rule of *dámdupat* was not applied

in the accounts taken. It was held that the plaintiff could recover interest at 6 per cent. upon the sum mentioned in the certificate from the day fixed in it for redemption. The previous case was distinguished on the ground that there the rule had been applied before the decree became final and binding, that is, before the confirmation of the Registrar's report while in the latter the rule was not applicable at that time. But there is little authority for such a distinction which, moreover, is incompatible with *Balakrishna* v. *Gopal Ragunath* which lays down generally that the rule is inapplicable to interest subsequent to decree and does not recognise any exception. In mortgage suits where no accounts are directed to be taken, but the amount due is declared at once, the rule would apply until judgment and not later. But it is to be remembered that interest subsequent to plaint both until decree and after that is awardable under a special provision, S. 209 of the Code of Civil Procedure, and as a suit may be long pending or the Registrar's certificate may take long to be issued, without any laches on the plaintiff's part, it would be very inequitable to hold the rule applicable subsequent to plaint. For these reasons, the above decisions appear not to be beyond question.

It is clear that the rule of *dámdupat* applies when both parties are Hindus. Where one of them is not a Hindu, questions of much interest arise. In *Hakma Manji* v. *Meman Ayab Haji*, 7 B. H. C., 19, the creditor was a Hindu and the debtor a Mahomedan. The High Court remitted the case to the Small Cause Court to determine whether the rate of interest claimed did not exceed what the plaintiff was allowed to take by the Hindu law. But the question whether the Hindu law was applicable was not argued in that case. But in *Nanchand* v. *Bapu Saheb*, I. L. R., 3 B., 131, where also the creditor was a Hindu and the debtor a Mahomedan, the decree of the Lower Courts which applied the rule was reversed on the ground that the Hindu law was not applicable as the debtor was a Mahomedan. This decision was followed in *Dawood* v. *Vallabhadoss*, I. L. R., 18 B., 227, and recently in *Harilal* v. *Nagar*, I. L. R., 21 B., 38. In the converse case where a Mahomedan is the creditor and a Hindu the debtor, it has been held that the rule applies. *Ali Saheb* v. *Shabji*, I. L. R., 21 B., 85.

The law of the debtor is under these decisions the law applicable. They are all cases in Bombay and may be explained by the fact

that, under the Statute creating the Bombay Supreme Courts continued in this respect by the Charter Act, as well as Bombay Regulation IV of 1827, the law of the defendant, that is, of the debtor (*Dawood* v. *Vallubhdas*, I. L. R., 18 B., 227) is made applicable, both in the city and mofussil of Bombay. But it is very questionable whether the same principle would follow from *a priori* juridical considerations. It is very unreasonable to bind a Mahomedan creditor by a rule of a law to which he owes no allegiance; on the other hand, there is no reason why a Hindu creditor should not be held bound by his own law, although against a Mahomedan debtor, especially as the rule of *dámdupat* seems rather intended to check the creditor's rapacity than protect the debtor. The analogy of pre-emption cases between Mahomedans and Hindus leads also to the same conclusion. In *Shumshool Nissa* v. *Zohra Beebee*, 6 N. W. H. C., 2, it was held by a Full Bench that though the Mahomedan law relating to gifts, pre-emption, etc., was not expressly made applicable by the Bengal Civil Courts Act, yet justice, equity and good conscience required that it should be applied in all such matters as between Mahomedans, *Stuart*, C. J., expressly observing that it would not apply where one of the parties was a non-Mahomedan. Where a Mahomedan and a Hindu were co-sharers of an estate and the Hindu sold to another Mahomedan, it was held that no right of pre-emption arose to the vendor's co-sharer. 'It is essential that the vendor should be subject to the rule of the law.' *Dwarka Das* v. *Husain Bakhsh*, I. L. R., 1 A., 564, following *Poorna Singh* v. *Hurrychurn*, 10 B. L. R., 117. Whether a Hindu vendee from one of two Mahomedan co-parceners is bound by the law of pre-emption, has been answered in the negative by the Calcutta High Court and in the affirmative by the Allahabad High Court. *Peacock*, C.J., and *Kemp* and *Mitter*, J. J., proceeded upon the broad ground that a Hindu is not bound by the Mahomedan law unless the latter created a defect in the title of the Mahomedan vendor which they held it did not. *Norman* and *Macpherson*, J. J., who dissented did not question the former proposition but proceeded upon a different view of the law of pre-emption, *Sheikh Kudratulla* v. *Mahini Mohan*, 4 B. L. R., F. B., 134. The judgment of the Allahabad High Court also proceeded upon a similar view of the law of pre-emption. *Gobind Dayal* v. *Inayatullah*, I. L. R., 7 A., 775. The effect of these cases is that where one of the parties is a Hindu and the other a Mahomedan,

the Mahomedan or Hindu law shall not be applied to the Hindu or Mahomedan respectively so as to deprive him of any right which he would otherwise have had—a principle embodied in a proviso to the Bengal Civil Courts Act, VI of 1873. I am not aware of any case in which the question was decided whether a Hindu co-sharer of a Mahomedan could claim the benefit of pre-emption as against the latter's vendee *being* a Mahomedan. It may be conjectured that he cannot inasmuch as the Mahomedan law of pre-emption is intended for the pre-emptor's benefit and probably did not contemplate its being taken advantage of by other than a Mahomedan, differing in this respect, as we have seen, from the rule of *dámdupat*.

Two recent cases in the Bombay High Court, previously referred to, decide what legal effects flow from the transfer of the equity of redemption of a mortgage from a Mahomedan to a Hindu and *vice versâ*. In the first of these cases, I. L. R., 21 B., 38, *A*, a Mahomedan, mortgaged his land to *B*, a Hindu, and afterwards assigned the equity of redemption to *C*, a Hindu. Prior to the transfer, interest exceeding the principal had accumulated. *C* contended that as a Hindu he was not bound to pay interest more than the principal. The Court held that, *as during the Mahomedan's time*, the land had lawfully become charged with the principal and full amount of interest, it could not be freed from it by a subsequent assignment. On the question whether the creditor was entitled to interest subsequent to the assignment, the Court expressed no opinion. In the other case, I. L. R., 21 B., 85, *A*, a Hindu, mortgaged his property to *B*, a Mahomedan, and after some time *A's* equity of redemption was transferred to *C*, a Mahomedan, by a Court sale. It was held that so long as the mortgagor was a Hindu the law of *dámdupat* applied and interest ceased when it became equal to the principal; but when a Mahomedan became the debtor, the rule no longer applied and interest began to run again from the date of the purchase. The same principles would be applicable when the governing law is taken to be the creditor's, instead of, as in these cases, the debtor's.

In the early years of the English rule, the Hindu law rule restricting the rate of interest as also that of *dámdupat* seem to have been in full force. For we see in all the Presidencies Regulations passed enacting that stipulated rates of interest shall be paid,

In Bengal, Regulation XV of 1793, and in Madras, Regulation XXXIV of 1802, enacted that all stipulated rates of interest shall be paid, but that no creditor shall be able to recover a sum for interest in excess of the principal. It should be borne in mind that both these rules applied to all persons whether Hindus or not and whether contracting in Calcutta or outside it. In Bombay, Regulation V of 1827 enacted a similar rule with regard to rate of interest with the proviso that the Hindu law rule of *dámdupat* shall be maintained in all applicable cases. It will be noted that while in Bengal and Madras the *dámdupat* was enforced as a statutary rule binding on all, in Bombay it was left to be enforced as part of the Hindu law. Then came Act XXVIII of 1855. This repealed all these Regulations and enacted that stipulated rates of interest shall be paid in all cases. Nothing was said about *dámdupat*. Two questions then arose :—(1) Whether Act XXVIII of 1855 by repealing the old Regulations had restored the Hindu law rule regarding rate of interest and was to be taken subject to it; (2) Whether the rule of *dámdupat* has been abrogated even as a rule of Hindu law by the repeal of the old Regulations or by the provisions of Act XXVIII of 1855. In 7 B. H. C., 19, the first question was answered in the affirmative and the same view was taken in *Ram Lall* v. *Haran Chandra*, 3 B. L. R., O. C., 130, by *Peacock*, C. J., but in *Mia Khan* v. *Bibi Bibijan*, 5 B. L. R., 500, the correctness of this view was doubted by *Phear*, J. It may be doubted whether the view taken by *Phear*, J., is not the more correct one, inasmuch as the words of the Act lay down clearly that all stipulations as to rate of interest shall be carried out.

The question of *dámdupat* stands on a different footing. Act XXVIII of 1855 by repealing the statutary *dámdupat* rule in the Madras and Bengal Regulations has the effect of restoring the Hindu law on the subject. In the Bombay Regulation, the *dámdupat* rule was not erected into a statutary rule but was left to be maintained, notwithstanding anything contained in it, as a rule of Hindu law, and therefore was not affected by its repeal, according to the well-known rule of interpretation that the exceptions to a general rule are not affected by the repeal of the latter, unless expressly provided. Nor is the rule itself incompatible with the provisions of Act XXVIII of 1855 which only deals with rates of interest. It has

therefore been held in several cases that notwithstanding that Act the rule of *dámdupat* is enforceable as a rule of Hindu law. 3 Bom., A. C. 11, 23, I. L. R., 5 C., 867, *Ib.* 14 C., 788.

The next question is, in what places or in what Courts is the Hindu law of *dámdupat* applicable? By the Charters of the old Supreme Courts of which the Calcutta, Bombay and Madras High Courts are the successors, it was ordained that they should administer the Hindu law among Hindus and the Mahomedan law among Mahomedans in all matters of contract. The Charters of these High Courts provided that they should administer the same law in their original jurisdiction as the Supreme Courts would have done unless otherwise provided. The rule of *dámdupat,* therefore, prevails in these Courts when exercising their original jurisdiction. It is also applicable in the Presidency Small Cause Courts and the Madras City Civil Court, as S. 16 of Act XV of 1882 and S. 8 of Act VII of 1892 require that these Courts shall administer the same law as the High Court in its original jurisdiction.

In the mofussil, by the Bengal Civil Courts Act, Act XII of 1887, applicable to the mofussil of Bengal and the North-Western Provinces, and the Madras Civil Courts Act, Act III of 1873, it is provided that the Hindu and Mahomedan laws shall be applicable in matters of succession, inheritance, marriage, or caste or any religious usage or institution, where the parties are Hindus or Mahomedans respectively, except in so far as such law has been altered, or abolished by legislation. In cases not provided for by the preceding part of the section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience. *Contracts* are thus not a subject on which the Hindu and Mahomedan laws are applicable. Nor has the rule of *dámdupat* been applied by the usage of the Courts, as being consonant with justice, equity and good conscience, in like manner with the native laws of gifts, pre-emption, etc., 6 N. W. H. C. 2 and 28. In 6 M. H. C., 400, *Holloway* and *Kindersley,* J.J., said "As to the Hindu Law, it is not binding as law upon such matters in the mofussil." The same view was taken in *Deen Doyal Poramanick* v. *Kylas Chunder,* I. L. R., 1 C., 92; *Het Narain* v. *Ram Dein, Ib.* 9 C., 871; *Surjya Narain* v. *Sirdhary Lall,* 825. The same remark applies to the rest of British India, with the exception of the Bombay Presidency.

In the mofussil of Bombay alone, this doctrine is held applicable. In I. L. R., 9 C., 829, *Prinsep*, J., pointed out this difference and explained it by a difference in the Regulations in that Presidency, under the proviso to Regulation V of 1827 that the Hindu law rule of *dámdupat* should be maintained in all applicable cases, the practice grew up of applying it in all cases where the parties were Hindus. Moreover, by Bombay Regulation IV of 1827, a Regulation which still remains in force in this respect, the law which the Courts in the mofussil were to administer was enacted to be "the Acts of Parliament and Regulations of Government applicable to the case; and in the absence of such Acts and Regulations, the usage of the country in which the suit arose: if none such appears, the law of the defendant; and in the absence of specific law and usage, justice, equity and good conscience." The Hindu law of contracts in general, therefore, and of *dámdupat* in particular, is, therefore, applicable in the Presidency of Bombay, as the law of the 'defendant' under this Regulation. And Regulation V of 1827 coming after this Regulation and directing that the rule of *dámdupat* shall be maintained in all applicable cases, amounts to a clear legislative direction that it shall be applied when the parties are Hindus.

It only now remains to note the effect, if any, of the Indian Contract Act upon the rule. If the rule is consistent with that Act, it is clear, it is not affected by it. In I. L. R., 5 C., 867, it was held that the rule did not make a contract invalid or illegal, but operated only as a rule of limitation compelling the creditor to seek his remedy within a certain time and that it was, therefore, not inconsistent with the Act. And the practice of the Courts of applying the rule, without reference to the Contract Act, speaks to the general prevalence of a similar impression, since as will be presently shown, if it is inconsistent with the Act, it is totally repealed by it. But it may be questioned whether if the rule is one of limitation merely, it is not abrogated like all other Hindu rules of procedure, and whether it is not incompatible with S. 37 of the Contract Act, which provides that the parties to a contract must either perform or offer to perform their respective promises. Now if the rule should be deemed inconsistent with the Act, is it repealed by it? The last clause of S. 1 of the Act enacts that the Act shall not affect the provisions of any Statute, Act or

Regulation not thereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act. The words 'not inconsistent' have been held to apply to 'usage or custom,' and while in Bombay the words 'usage or custom' have been interpreted to mean both a general usage pervading all trades as well as a special usage governing a particular class of contracts. In Calcutta they have been taken to refer only to general usages common to all trades. Whichever view, therefore, may be taken, since *dámdupat* is a general usage, it must be taken to be repealed as a usage by the Contract Act. In the Presidency towns, as we have seen, the rule is applicable by virtue of the Charters of the High Courts which directed them to administer, until otherwise provided, the same laws in their original jurisdiction which the Supreme Courts would have done. As the Contract Act applies to the whole of British India, including the Presidency towns, it is to be inferred that it 'provides otherwise' within the meaning of the Charter Acts and that without affecting any of their provisions. In this view it is unnecessary to consider whether the words 'not inconsistent' apply to 'Statute, Act or Regulation.' The result, therefore, is that if the rule of *dámdupat* is inconsistent with the Contract Act, it is entirely repealed by it.

The Usury laws have in most civilized countries been weighed in the balance and found wanting. And yet this law remains in force, the relic of a bygone civilization of thirty centuries ago. Under it, there is one rule within the Presidency towns and another outside them. It is also a law which changes not with the *locus contractus* but with the *forum*, contrary to all sound principles of jurisprudence. The rule must be done away with altogether, or if it cannot be, may be made universal throughout India but to leave it as it is, anomalous, ill-defined and undeveloped, applicable only among a class of people and in a set of tribunals, is altogether undesirable.

M. A. TIRUNARAYANACHARIAR.

TRANSLATED FROM VAIDYANATHA DHIKSHITIYAM.

Qualifications of the Bridegroom.

(1). On this subject, *Manu* says: "An intelligent man should marry his daughter before she attains her age to a highborn, handsome and worthy bridegroom," (2) *Yama* says "The wise should

give their girls after fully considering the seven good points in the bridegroom, *viz.*, lineage, behaviour, physique, age, attainments, means and the existence of guardians. The rest should not be thought of." (3) But *Vishnu* says "The family of a Brahmin must be accepted and not learning or wealth in the matter of the daughters and in ceremonies. Learning does not count there as a chief ground." *Commentary.*—This is said to show that lineage is the most important consideration, but not to deny the importance of learning. (4) Therefore it is that *Aswalāyana* says: "Examine the lineage first." (5) *Apastamba* says: "The qualifications of the bridegroom are his having good relatives, being well-behaved and handsome, having a knowledge of *Srutis* and being free from disease." (6) *Gautama* says "Let him give to one having good attainments, character, relatives and disposition." (7) *Satātapa* says "A bridegroom, mendicant, born of a good family, well-behaved, handsome, intelligent, learned and young must be secured." (8) *Yajnavalkya* says "The bridegroom must possess good qualities, must be of good caste, learned in the Vedas, young, intelligent and social and must have been well ascertained on examination to have virile power." (9) *Katyayana* also says:—"Women have been created to bear children. They supply the soil and men the seed. The soil must be given to one having the seed. Let, therefore, the seed be well examined." (10) *Narada* thus says how it should be examined. "He whose semen virile floats on water and whose urine is noisy and frothy is proved by these tests to be a man. If he does not answer these tests he is impotent. Fourteen sorts of eunuchs are recognised by the wise in the *Sastras.*" *Commentary.*—These are (1) One who has no scrotum from birth. (2) One whose scrotum is split into two. (3) One who could cohabit once with a woman if he has not cohabited with a woman for fifteen days previously. (4) One who has lost his masculine power by the curse of his preceptor. (5) By disease. (6) By the wrath of the Gods. (7) One whose potency is roused only by jealousy. (8) One whose potency is roused only by repeated amorous attentions of women. (9) One whose semen is windy. (10) One who always talks of his potency without approaching a woman. (11) One who has lost his potency by controlling his passions. (12) One who is incompetent to impregnate. (13) One who either through cowardice or confusion loses his virile power; and. (14) One who

exhibits his masculine power in the case of other women than his own wife. (11) The first two being incurable and the third should be rejected. The next three should be allowed a probation of one year. The next four of those defined should be discarded like sinners, even by women who have already had sexual intercourse. Even though a woman had married either of the next two, she is allowed to marry another husband after trying her husband for six months. The next in order may improve by cohabitation with a bold woman. Let his young wife advise her weak husband in secret. She who has married one who has masculine power in the case of another woman but herself, may marry another husband. This is a rule propounded by *Prājāpati*. *Commentary.*—What is here said about marrying another husband applies only to other *Yugas*, the re-marriage of women in the *Kali Yuga* being forbidden by the *Srutis*. (12) *Kātyāyana* says :—"The lunatic, the sinner, the leper, the eunuch, one of the same *gotra*, the blind and deaf, the epileptic, these are said to be bad husbands. The faults in the bridegroom have already been described. The intelligent should not give their daughters to men who are living at a great distance, who have no learning, who are treading the path to emancipation, who are valiant and who are poor." (13) We find in *Apararca* "Unworthiness, peevishness, cruelty and absence of *Karma* show a man in this world to be of bad parentage." Here ends the description of the qualifications of the bridegroom.

The Time for Marriage.

(1) On this point, *Bodhayana* says: "Let a man give his daughter to a bachelor of good qualities while she is a *Nagnika*. Let him not give his daughter to one devoid of good qualities although she be a *Rajaswala*." (2) *Vasishta* says: "The father must marry his daughter while she is a *Nagnika* lest she attain her age. If she be not married when she comes of age, the sin attaches to the father" (3) The same author thus defines a *Nagnika :* "So long as a girl does not feel ashamed in the presence of males and cover her naked limbs, so long she is a *Nagnika*. So long as she does not wear a cloth, so long as she plays in the dust, so long as she thinks no harm, so long is she a *Nagnika*." (4) *Samvarta* says : "So long as a girl does not feel shame, so long as she plays in the dust, so long as she stands in the way of the cattle, within that

time should the girl be married. At eight years of age she is called a *Gouri*; at nine, a *Rohini*; at ten, a *Kanya*; and after that a *Rajaswala*." *Commentary*.—That she becomes afterwards a *Rajaswala* has reference to cases occasionally occurring; for menstruation does not in all cases occur at that age. (5) Therefore it is that the same author says: "A father who does not marry his daughter, even when arrived at the age of twelve, becomes a sinner. The mother, the father and the elder brother, they three go to hell, who see their *Rajaswala* daughter unmarried. He who gives a *Gouri* in marriage goes to heaven. He who gives a *Rohini* in marriage goes to *Vaikunta*. He who gives a *Kanya* in marriage goes to *Brahmaloka*. He who gives a *Rajaswala* in marriage goes to a hell named *Rourava*. Let a man therefore give his daughter in marriage before she attains puberty. The marriage of a girl of eight years of age is highly commendable." (6) *Yama* says: "At eight years of age, a girl is called a *Gouri*; at nine, a *Nagnika*; at ten, a *Kanyaka*; at twelve, a *Rajaswala*." (7) *Devala* says: "A barren woman is one kind of *Vrishali*; the mother of still-born children is another and the third is an unmarried girl in whom menstruation has commenced." (8) *Apastamba* says: "A girl of eight years of age is a *Gouri*; of nine a *Rohini*; of ten, a *Kanya* and older than that, a *Rajaswala*. When arrived at the twelfth year women begin to menstruate." *Commentary*.—It means that it is mostly so. It does not necessarily mean that girls certainly begin to menstruate at twelve; for in the case of some, menstruation is seen to begin even earlier. (9) Therefore it is that *Yama* and *Samvarta* say: "At ten a girl is called *Kanya*; and afterwards, a *Rajaswala*." *Commentary*.—It is thus clearly settled that so long as menstruation does not begin, a girl continues to be a *Kanya*. (10) It is only therefore that *Yama* says: "Let a man see a girl married before she begins to menstruate." (11) *Manu* also says: "A man of thirty years may marry a handsome girl of twelve." *Commentary*.—This text applies to cases where menstruation has not begun. (12) It is only therefore that *Brihaspati* says: "When an unmarried girl living in her father's home begins to menstruate, her father becomes guilty of causing abortion and she becomes a *Vrishali* according to the *Smritis*. A Brahmin who, stupefied by passion, marries such a girl becomes the husband of a *Vrishali*, unfit to talk with and eat with. A Brahmin who, stupe-

fied by passion, marries a *Vrishali* undergoes continual pollution as if he murdered a Brahmin every day. If he co-habits with a *Vrishali* for a single night he must expiate his sin by begging his bread and repeating mantras for the space of three years. He who cohabits with a *Vrishali* continually for one month becomes degraded in the present birth to the status of a Sudra and dying is re-born a dog." (13) *Nārada* says: "He who does not give a girl in marriage before she menstruates is guilty of causing an abortion every time that she menstruates before marriage." (14) *Yājnavalkya* also says: "Not giving her in marriage, he becomes guilty of causing abortion when she menstruates." (15) *Vyāghrapāda* says: "There is a time fixed as appropriate for the marriage of women. *Manu* has enjoined marriage in the case of women, in the place of *Upanayana*." (16) *Yama* says: "*Brahma* said that the marriage of women is their *Upanayana*. Therefore the eighth year from conception or the eighth year from birth is preferable. If, owing to bad times or bad state of the country, there is a fear of being driven to contract an unlawful marriage, a girl may be given in marriage even while she is a *Nagnika*, if a proper match is available. Even where the girl is a mere child, if a bridegroom full of good qualities is available, let a man give her in marriage, though before the proper time, for fear that the state of the country and the times may change." (17) Having thus recognised infant marriage, *Prājāpati* thus lays down a special rule of obsequies in such cases: "If a girl married before she is two years of age dies, the corpse should not be buried, but obsequies should be performed with mantras." (18) *Manu*, however, says: "Let the girl though menstruating remain in her parents' house unmarried till her death but let not one give her in marriage under any circumstances to one devoid of good qualities." *Commentary.*—This is simply intended to prohibit her being married to one devoid of good qualities where one of good qualities is available and not to prohibit her being given in marriage at all events to one devoid of good qualities. (19) So also in respect of what *Yama* and *Bodhāyana* say: "Let a man give, as his means would permit, his *Nagnika* daughter in marriage to one having good qualities; but let him not give even his *Rajaswala* daughter to one devoid of good qualities. When the father does not give his daughter in marriage, though come of age, the girl herself should seek a proper husband." Thus

says *Yama*: "Where a girl is not given in marriage even at her twelfth year and remains in the house, her father is guilty of the sin of causing abortion, and the girl should herself seek a husband." *Commentary.*—This seeking of the husband must be after three years from her first menstruation. (21) *Bodhāyana* also says thus: "He who does not give in marriage a girl who has been menstruating for three years is certainly liable to a sin equivalent to that of causing abortion. This is so where none has asked for her; but if she had been asked for, he suffers every time that she menstruates as much sin as is equivalent to that of causing abortion." This is what *Manu* said: "She must await the command of her father for three years after menstruation commences, and in the fourth year seek herself a proper husband; and if a proper husband is not available, she should wed herself even to one devoid of good qualities." (22) *Manu* also says: "A good girl must wait three years after menstruation, and after that time should herself seek a proper husband." It is also said: "If a girl not being given in marriage finds herself a husband, she commits no sin, nor he whom she marries. A girl who seeks her own husband should not take jewelry belonging to the father or the mother or given her by the brother. If she takes it, it is theft. He who marries a girl who has attained her age should not give any bride-price to her father; for her father who had seen her menstruate before she was married has forfeited all right in her." Here ends the dissertation on the time for marriage.

On Those Who are Competent to Give a Girl in Marriage.

(1) On this subject, *Yajnavalkya* says: "Of the father, the paternal grandfather, the brother, the *sakulyas* and the mother, the one subsequently named is, in the absence of those previously named, and if not disqualified, competent to give the girl, and if he does not give her, he suffers the sin of causing abortion at every one of her menstruations. In the absence of anybody to give her the girl herself should seek a proper husband." *Commentary*—'Of father,' etc., the one succeeding is, in the absence of the one preceding, competent to give the girl in marriage. 'If not disqualified' means 'if not suffering from lunacy, and the like disqualifications.' Therefore, he who being competent does not give her, suffers the sin of causing abortion at every menstrua-

tion. Where, however, there is nobody to give, the girl herself must seek a proper husband having the necessary qualifications. This is the purport. (2) *Narada* says: "Let the father himself give his daughter in marriage, or the brother with the father's consent; so also the maternal grandfather, the maternal uncle, the members of their family, or other relatives. Let the mother give her daughter in marriage in the absence of all of these, and if she keeps her virtue. If she is disqualified, let the men of her caste give her daughter in marriage. If there is nobody at all to give, let the girl go to the king, and with his permission find for herself a proper husband, one of her own caste and worthy of her in respect of family, character, affluence and Vedic learning. Let her practise virtue with him and beget sons of him. Though a man otherwise independent does a right thing while not suffering from some disqualification, the thing is supposed not to be done, because he was, in respect of it, not independent." (4) *Manu* says: "To whomsoever the father or the brother with his consent gives a girl in marriage, let the girl serve him while alive and be true to him even after his death." *Commentary.*—This text is intended to show the preferential right of the father and the brother and not to prohibit others from giving the girl in marriage. So much about persons competent to give a girl in marriage.

On Supersession Of Wives.

(1) On this subject, *Manu* says: "A wife who drinks wine, whose conduct is unbearable, who acts adversely to her husband, who is suffering from disease and who is always mischievous and prodigal should be superseded. A barren woman should be superseded at the eighth year; the mother of still-born children, at the tenth and the mother of female issue alone, at the eleventh. But a wife that talks unkindly should be immediately superseded. A wife who though sickly, is agreeable and well-behaved may be superseded with her own consent, but should never be disrespected. A woman who, on being superseded, leaves her husband's home, should immediately be prevented from doing so. She must be sent to her father's house or dismissed in the presence of all the family." (2) *Yajnavalkya* says: "A wife who drinks wine, who is diseased, fraudulent, barren, prodigal, harsh in language, bearing only female issue and hateful of her husband should be superseded. A woman

is said to be superseded when her husband marries another while she is living in the house." *Commentary.*—A wife who has been superseded should be supported (by her husband). Otherwise a great sin will be committed. Where the husband and the wife are agreeable to each other, there thrives the threefold object of human existence. A man who abandons his wife who is obedient to his commands, clever, mother of valorous sons and agreeable in her speech must be made to give her a third portion; but if poor, he must be compelled to maintain her. *Commentary.*—'Abandons' means 'supersedes.' 'A third portion' means 'a third of his property.' 'Maintain her' means 'give her food and raiment.' (3) *Parasara Madhaviya* says; "A man should abandon for the protection of his own virtue a wife who obstructs the practice of virtue, who is ill-behaved, irascible and harsh in language." *Commentary.*—'Abandon' means 'supersede.' (4) *Daksha* says: 'The first wife inures for the performance of virtue and the second, for the gratification of passion. The latter yields him all sexual pleasure, but no future bliss.' (5) *Smritiratna* says: "He who out of passion would supersede his wife and wishes to marry another must first cleverly propitiate his first wife with wealth and then marry another." (6) *Bodhayana* says: "A man should abandon a barren woman at the tenth year, the mother of female issue alone at the twelfth, and the mother of still-born children at the fifteenth; but a harsh-tongued woman immediately." (7) *Apastamba* says: "Let not a man marry a second wife where the first is virtuous and has borne children. In the absence of either, he must take fire from the first." *Commentary.*—'Virtuous' means 'zealous in the performance of *Srouta* and *Smarta* rites': when she is a mother and has children. When the wife has both these qualifications, he should not marry another; but when she has not either of these—virtue or children—a second wife may be married, because the text says, 'even while she is living, etc.' If she dies, he may marry a second wife subsequently with the sacrificial fire taken from her. Even if he had male issue by the first wife he may marry a second wife for the practice of virtue. (8) *Satatapa* says: "Where the wife is addicted to drinking wine, is suffering from a chronic disease, is deceitful or childless or bearing only female issue or given to scolding or prodigal or hateful of her husband, he may marry another even while she lives." (9) Another *Smriti*

says : "Where a wife is sickly or prolific of female issue or barren or insane or past menstruation, she may be, if not wicked, excluded from her husband's bed, but not from participating in the performance of virtue." (10) *Garga* says : "A house-holder should have only one wife. He may marry another for the gratification of passion; but he should never marry a third though he may even marry a fourth."

On the Order of Persons Bound to Perform the Funeral Rites of the Deceased.

Sumantu thus mentions the persons bound to perform the funeral rites, such as cremation, etc. "The *aurasa* son should zealously perform the obsequial rites of his deceased mother and father with proper mantras." *Jamadagni* thus lays down the manner of performing the obsequies when the son is unable to perform them. "The offering of rice-balls and libations of water to the deceased father must be performed by the son. Even if unable, the son must do the cremation, and somebody else must complete the rest." If there be a number of *aurasa* sons, the eldest alone should perform the obsequial rites of the father. "Whatever is done by the eldest, not divided in respect of property, with the consent of all the rest shall be deemed to be done by all of them." So says the text. Another *Smriti* says : "The *Navashraddhas*, the *Sapindikarana* and the *Shodasa Shraddhas* must all be performed by one and the same person, although they are all divided from one another." The *Chandrika* says : "The *aurasa* son alone should do the cremation, etc. Where the sons are many, the best of them in quality should do it; but if of the same quality, the eldest alone should do it." But *Rishyasringa* says : "Of the sons, whoever is the most beloved of the father, whether he be intermediate, youngest or eldest, all (funeral rites) must be done by him alone. Where all the sons were hated by their deceased father, his wife, the brother, the daughter, even a friend, etc., should perform the cremation and other funeral rites of the deceased."

Jamadagni says :—"The cremation, the offering of rice-balls and the libations of water must be performed by the eldest son. If unable to do them himself, he must have them all done by another." *Commentary.*—If the eldest of all the sons is unable or not near at

hand, the eldest among the sons present at the spot must do all these; for the *Srutis* say: 'The eldest by birth must perform the father's obsequies.' Some say that the expression 'eldest by birth' bears a different construction. 'If there are a number of sons born of different mothers, he alone who is the eldest by birth must perform the father's obsequies and not the son of the first wife; for all texts contain the expression 'eldest by birth.' Manu says: "Of the sons and especially those born of wives of the same caste, the fact who is the eldest is determined with regard to the time of birth and not to the order of their mothers. Even the holy books call him eldest, who is born first."

Another *Smriti*, however, says: "Whether the eldest or the youngest, the son of the first wife should perform the cremation of the (father's) corpse. As cremation is the most important of the rites, the son of the first wife should be held the eldest." Another *Smriti* says: "If a person has two wives and sons, the same man should perform the obsequies of both. In the event of the death of the father, the son of the first wife should be regarded as the eldest son." *Commentary.*—The expression 'the son of the first wife' means 'the son of the wife highest in rank, *i.e.*, the son of the wife of the same caste;' for, otherwise, there will be a conflict with the text of *Manu* 'Of sons of the wives of the same caste, etc.' Accordingly *Bodhāyana* also says that the son born of the wife of the same caste is alone competent to discharge the obligation incurred by his father, etc. "Let a man, having controlled his senses, beget children on wives of his own caste. Having propitiated the Rishis by studying the Vedas, Indra, by sacrifice, and the manes, by his sons, he rejoices in Heaven freed from all obligation." *Commentary.*—The eldest *aurasa* son by another wife should perform the obsequies of the father alone and not that of his step-mother, being born of another womb. The son, though the youngest, must himself perform the obsequies of his own mother; for the *Smriti* says: 'The *aurasa* and the *kshetraja* sons must perform the obsequies of their mother and in their absence, sons born of her co-wife.'

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The *Smritiratna* says that, even where there is a son by a co-wife, the husband alone should perform the cremation and other

rites. "Where of wives of the same husband, one dies sonless, the husband alone should perform the funeral rites even where another wife has male issue. In the absence of the husband, the son by the co-wife is certainly bound (to perform the rites), and in his absence, his sons, and of them the one present at the spot is preferred to those absent." *Commentary.*—This rule of preferring the husband to the son of a co-wife applies to cases where there is *stridhana* to be inherited. Otherwise, it is said, the son of a co-wife alone should perform the funeral rites. In the matter of inheritance, *Manu* says: "Where the marriage is of the *Brāmha*, the *Daiva*, the *Ārsha*, the *Gāndharva* or the *Prājāpatya* form and the woman dies childless, the husband alone takes her property." *Yājnavalkya* also says: "The *stridhana* of a childless woman goes to her husband where she has been married in the first four forms, such as *Brāmha*, etc. If married in the other four forms, it goes to the husband where he has only daughters." *Commentary.*—*Kātyāyana* says that where the marriage has been in the *Āsura* and the following forms, and where there is no property to be inherited, the son of the co-wife is the first to perform the rites. "The *aurasa* son must perform the funeral rites of his own mother, and in his absence, the son of the co-wife and other sons, *kshetraja*, etc. In the absence of them all, the husband and in his absence, the *sapindas* must perform the funeral rites of the deceased woman." Another *Smriti* says: "The son of the co-wife, the *kshetraja* son, other sons, and the husband should perform the funeral rites of the deceased sonless woman, every one in the absence of all mentioned before him." *Manu* also says: "If, among several wives of the same man, one is the mother of a son, then according to *Manu*, all these wives are mothers by that son." *Brihaspati* also says: "This is the rule in respect of several wives of the same husband—if among them, one is the mother of a son, that son is the giver of the *pinda* to them all." *Gautama* also says: 'All the wives of the father are mothers.' *Commentary.*—Some maintain that the texts, 'Though another has a son, still the husband alone should perform the obsequies,' etc., apply in the case of a wife of a different caste and that the texts, 'the *aurasa* son born of her should perform,' etc., are intended to show that the son of the co-wife should be preferred and apply in the case of wives of the same caste. Others on the other

hand contend that, as there is no clear and direct authority upon this point, the determination of the order must depend, according to the text, 'he should perform who takes the property,' on the fact of inheriting property or otherwise. Others yet contend that, as the text, '*Aputrava*,' etc., applies only to cases of women having no issue of their own, and that there is no reason for preferring the son of the co-wife while there are grandsons, etc., of the deceased woman entitled to take her property, considering the *Smriti* which says that he who takes the property is the giver of the *pinda* to the deceased. This is said also in another *Smriti.* "Although the co-wife has a son, the husband should perform the funeral rites of his sonless wife. In the absence of the daughter's son and the husband, the son of the co-wife should perform them." *Commentary.*—The meaning of this is that in the absence of the husband and the daughter's son, who would inherit her property, the son of the co-wife should perform them. This rule applies where there has been a partition. If undivided, the son of the co-wife certainly takes precedence over the daughter's son. In the absence of the son, etc., the husband should perform the wife's obsequies; and in his absence, the daughter. On this point *Sankha* says: "In the absence of sons, the husband and the wife should each perform the other's obsequies. Where one has a daughter but no son, she alone should give the *pinda*." *Commentary.*—The meaning is that in the absence of the husband, the daughter should perform the mother's obsequies; and in the absence of the wife, the daughter should perform the father's obsequies. The daughter's right to inherit her father's property is thus spoken of by *Devala*: "The daughter virtuously begotten inherits, like the son, the property of her sonless father." *Commentary.*—The daughter, married and unmarried; another *Smriti* says: "As is one's self, so is one's son. The daughter is equal to the son. While she, his *Atman*, lives, how can another take his wealth?" On this point, some contend that from the *Smriti* which says: "The son must perform the father's *shraddha*, and in his absence, the wife, next, the daughter's son who takes the property, and after him, the brother and his son," and from the order of persons entitled to inherit laid down in the *Smriti* "The wife and the daughter, the parents and the brothers accordingly," the wife and the daughter take precedence over the daughter's son. But others maintain that the daughter's son

takes precedence over the wife and the daughter, on the strength of *Vishnu Smriti* which says that the daughter's sons should be regarded as son's sons and on the strength of custom observed by wise men. In the absence of the daughter, the brother, etc., is the performer (of the obsequies). "The brother born of the same mother and his sons should perform the obsequies of the deceased brother. In the absence of these, the brother born of a different mother and in his absence, his son should perform the same." Another *Smriti* says: "Of the wife, the brother, his son, the father, the mother, the daughter-in-law, the sister, the nephew, the *sapindas* and the *sodakas*, the one subsequently named is, in the absence of all previously named, according to the *Srutis*, the giver of the *pinda*." *Vishnu Purana* also says: "The son, the brother, his son, the wife, the mother, the father, and the disciple, even in the absence of property, should perform the funeral rites of the deceased." However, a text of *Manu* says, that if among several brothers of the whole blood, one has a son, then all those brothers are, according to *Manu*, fathers by virtue of that son. This text has been commented upon by *Vijnaneswara* and others, as laying down, not that the brother's son takes precedence over the brother, but that while there are sons of brothers none else should be adopted as a son. Some contend that on the strength of *Kātyāyana's* text: "Of the sonless man, his wife of good family or daughters, and in their absence the father, the mother, the brother and his sons are mentioned (as heirs)," and of the *Smriti* laying down the order of heirs as 'the wife, the daughters, the parents and the brothers,' the parents take precedence over brothers, etc. Others maintain on the strength of a number of texts already cited, such as 'the wife, the brother, his son, the father, the mother,' etc., the brothers, etc., are entitled to precedence over the parents. But there is the text of *Bodhāyana*, which says: "Neither the mother nor the father should perform the funeral rites of the son. Nor the elder of several brothers, the funeral rites of the younger." There is also the text of *Kātyāyana* which says: 'The father should under no circumstances perform the *shraddha* of his sons; nor the elder brother, of his younger brothers." Another *Smriti* also says: "The father should not perform the *shraddha* of the son, nor the elder brother, of the younger." All these texts

apply to cases where the person primarily bound to perform the *shraddha* such as the son, the younger brother, etc., is alive; or they may apply also to cases where the person so bound to perform bears no good will to the deceased. Accordingly *Bodhāyana* and *Devala* say: "The funeral rites of the father must be performed by the son, and of the brother, by the younger. The sister's sons may also perform the funeral rites of the maternal uncle dying without male issue. The father should not perform the funeral rites of the son, nor the elder brother, of the younger. If they do it out of affection they may do all but the *Sapindikarana* rite." The *Sangrahakara* says that if there be nobody else to perform, (even this *Sapindikarana*) should be performed by them. "In the absence of any one else, even the father, the mother and the elder brother should perform the *Sapindikarana*."

Another *Smriti* also says: "In the absence of all others even the father or even the elder brother should perform the obsequies. The elder brother should do so especially at Gaya." The *Smriti sarasamuchchaya* thus lays down the sin attaching to the omission so to perform. "The father, the elder brother or even the mother must perform the funeral rites of a person who died leaving no other relatives. Otherwise great sin will be the result." This indicates that where the father and the elder brother are both alive, the father being the nearer must perform the funeral rites and in his absence, the younger brother. When there are many younger brothers, of the deceased, the next younger brother and not one more remote should perform the funeral rites; for *Manu* and others say "He who is the nearest *Sapinda*, etc." The *Smritiratna* says that while the father is alive one should have the obsequies of brothers etc., performed by some other person. "The rites in reference to the dead body, the *Sapindikarana* and the anniversary of the brother, etc., must be performed by some other while one's father is alive." The order accordingly is:—the father and the mother in the absence of the brother and his son, the daughter-in-law in the absence of the mother and the father; in her absence, the sister, younger or elder; in their absence, their sons; in the absence of the sister by the same mother, the sister by a different mother; in her absence, her son; next the *Sapindas*; next the *Samanodakas*; after them the *Sapindas* of the mother; after them

the *Samanodakas* of the mother; in their absence, the *Sagotras*; next the disciple; in his absence, the *Ritvik*; after him, the preceptor; in his absence, the son-in-law, and in his absence, a friend.

S. SITARAMA SASTRI.

NOTES OF INDIAN CASES.

Kondaiya Chetti *v.* Narasimhulu Chetti, I. L. R., 20 M., 97.

This case raised a rather difficult question of agency. An owner of goods who consigned them for sale to an agent in London authorized him to sell the goods at the best price obtainable without reference to the owner and gave him full discretion and power to act to the best of his judgment in the matter of the sale. The agent had made advances on the goods and was authorized to pay himself from the sale-proceeds and to draw on the owner for any shortfall. The owner subsequently fixed certain limits of price but the goods were sold by the agent below the limits and the owner was sued for a shortfall. The question was whether the consignor could after giving to the agent authority to sell to the best of his judgment afterwards impose a limit of price. *Subrahmanya Aiyar*, J., held on the authority of *Smart* v. *Saunders*, 3 C. B. 400, 401 and *Decomas* v. *Prost*, 3 M. P. C. (N. S.) 158 that the authority did not become irrevocable by reason of the advances and that the factor must make out an agreement express or implied conferring on him a power to sell against the owner's wishes. On appeal it was held by *Sir Arthur Collins*, C. J., and *Benson*, J., that under S. 202 of the Contract Act, the agent's authority to sell as he thought fit was irrevocable in the absence of an express contract reserving to the owner a power of imposing fresh terms on the factor. We do not think that S. 202 really throws any light on the matter. It merely prohibits a termination of the agency. It does not prohibit the principal from fixing a limit of price. So long as the goods are allowed to be in the hands of the factor and he is authorized to sell out above a certain limit, it would be difficult to say that the agency has been terminated. The question must, therefore, be decided upon general principles. The powers of an agent are no doubt open to modification by the principal. But where he has acquired an interest in the subject matter of the agency as in the present case, the transaction is virtually one of pledge and it would be unreasonable to allow the owner to hamper the agent in the realization of the amount due to him by unreasonable restrictions. The true principle appears to us to be that stated by

Farran, J., in *Jafferbhoy Ludhabhoy* v. *Charlesworth*, I. L. R., 17 B., 543, where goods are consigned to a foreign merchant as security for an advance, albeit he may be a factor entrusted with the sale of goods on commission and where by reason of the fall in the market or other causes his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after due notice to the principal, although the latter may place a limit on their sale and desire to hold on, if the principal do not put the factor in funds to make up the deficit. This conclusion tends to convenience and justice and is in line with the American decisions.

Nalla Karuppa Settiar *v.* **Mahomed Iburam Sahib,** I. L. R., 20 M., 112. The decision in this case appears to us to be right. Mere membership in a firm which carries on business within the jurisdiction of a Court is not enough to confer jurisdiction; nor is the fact that a person is interested in immoveable property situated within the jurisdiction of a Court sufficient where the suit does not relate to such property. The doctrine of constructive residence and submission to jurisdiction cannot be maintained after the decision of the Privy Council, *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, L. R., 21 A., 171, 186.

Kadar Hussain *v.* **Husain Saheb,** I. L. R., 20 M., 118. The Full Bench is clearly right in holding that Art. 12 of the Limitation Act does not apply to a suit for the recovery of land sold by mistake in execution of a decree where the plaintiff was not a party to or bound by the decree or the sale.

The article is applicable to the case of persons who would be bound by the sale if they did not impeach it.

Krishna Pattar *v.* **Srinivasa Pattar,** I. L. R., 20 M., 124. We find it difficult to understand this decision except upon the principle of a compensation of errors. In a decree for redemption of land, the mortgagor was, in accordance with the law in Malabar, directed to pay a sum of Rs. 1,429 to the mortgagee as compensation for improvements made by the latter. The mortgagor applied for execution within six months of the decree. But during this interval the value of the improvements had diminished without any fault on the part of the mortgagee by the cost of trees of the value of Rs. 157. Was the mortgagor bound to pay the sum decreed or that sum *minus* the amount of the loss. The Madras High Court rules that the mortgagor is only bound to pay a smaller sum. The learned Judges point out that the basis of the liability to pay compensation is the benefit arising to the mortgagor

from the improvements and that the liability cannot exceed the benefit. This principle is no doubt applicable, but we do not see how the rights of parties can be unsettled after they have been once determined by the decree. The mutual rights of the parties are ascertained by the decree and the parties cannot subsequently claim to go behind it. The fact that the relation of mortgagor and mortgagee subsists even after decree can be no ground for disturbing the decree. The decision is opposed to sound principles and its only justification is that the Madras High Court has held that when the value of the improvements rises since the date of a decree for redemption, the mortgagee can claim a re-valuation in execution proceeding, *Rammuni* v. *Sankar*, I. L. R., 10 M., 367.

Ishan Chundar Sirkar *v.* **Beni Madhub Sirkar,** I. L. R., 24 C. 62. Where a person purchases the equity of redemption in certain property in execution of a money decree against a mortgagor, and a mortgagee subsequently executes his decree against the properties purchased, the execution purchaser is according to the Full Bench entitled to come in as a representative of the judgment-debtor under S. 244 of the Code of Civil Procedure.

Sheo Shankar Gir *v.* **Ram Shewak Chowdhry,** I. L. R., 24 C. 77. The decision in this case as to the inapplicability of Art. 91 of the Limitation Act to a suit to set aside an alienation by the manager of an endowment is in keeping with other recent decisions in regard to suits for the purpose of setting aside the acts of persons similarly situated. In such cases the transaction entered into by the guardian or manager is either void or valid and is not voidable. If it is valid, it is binding; if it is void, no suit is necessary to set it aside.

SUMMARY OF RECENT CASES.

Suit for rescission of contract—Inconsistent claim—Motion inconsistent with suit.

Cook *v.* **Andrews** [1897, I, Ch. 266, per *North, J.*]

The plaintiff had agreed to sell to the defendant certain leasehold premises under the following conditions:—(1) The defendant was to pay a certain sum of money at the time of delivering possession; (2) he was to pay on taking possession the rents and other outgoings and the cost of a new fence erected by the plaintiff. The prescribed sum was paid

on taking possession, but the defendant failed to pay the rents and the cost of the fence. The lease was about to be forfeited and the plaintiff had to pay the rents to preserve it. The plaintiff then commenced an action for rescission of the agreement on the ground that he had been induced to enter into it by misrepresentation, and in that suit moved for an order directing the defendant in pursuance of a term in the agreement to deliver up possession of the leasehold to the plaintiff in default of his paying to him or into court the sums that he had paid for rents.

Held: that the motion seeking in effect the specific performance of the agreement was inconsistent with the claim in the suit which was for its cancellation and must, therefore, be refused.

But that a receiver may be appointed to secure the payments in question and thus to prevent forfeiture.

Landlord and tenant—Forfeiture for breach of covenant—Notice of breach.

Fletcher v. Nokes [1897, I, Ch. 271, per *North, J.*]

The law has always been very anxious to give relief to tenants against forfeitures of their leases for breaches of covenants, though no doubt by so doing it has had to violate the fundamental rule that parties ought to be left to the results of their own contracts. The Indian legislature has done something in this line by enacting S. 114 of the Transfer of Property Act. But we venture to submit that the scope of the section is very limited and that more cases of relief against forfeitures should be provided for and more precautionary measures should be imposed on the landlord to be adopted by him before rushing into court. For instance, the inserting in the Transfer of Property Act of a provision like that of S. 14 (1) of the Conveyancing and Law of Property Act 1881 (44 and 45 Vict., c. 41) would be very advisible. Under that section before the landlord can take advantage of a forfeiture for breach of covenant he must first serve a notice on the tenant giving him particulars of the breach complained of, and if the breach is capable of remedy, requiring him to remedy the breach, and in any case to make compensation in money for the breach within a reasonable time to be fixed.

A landlord gave notice to his tenant to the effect "that you have broken the covenants for repairing the inside and outside of the houses leased to you, &c.," and sued for possession of the houses from the tenant. The rest of the notice satisfied the provisions of the section

above-mentioned. The Court held, however, that no particulars of the breaches complained of had been given and that the plaintiff must consequently be non-suited.

Power of appointment—Power in the nature of a trust.

In re **Weekes' Settlement** [1897, I, Ch. 289, per *Romer*].

The distinction between a mere power of appointment and a power in the nature of a trust has not always been correctly appreciated and applied by Judges to the facts of particular cases that come before them. The distinction is important, because in the latter case if the power is not exercised the courts will carry out the trust where as in the former the courts will not take any action if there is a default in the exercise of the power. There is a conflict between the decided cases on this point, and some cases have laid down that where there is a power of appointment given to an individual in favor of some persons and there is no gift over in case of failure to appoint and the holder of the power makes default in the appointment, then the power operates as a gift in favor of the intended appointees. This is rather stating the law too broadly. In fact, this is nothing but a mere rule of construction, and we have to look to the wording of the will or other instrument, as the case may be, to see whether there is a general intention to give to the intended appointees, though a choice might have been given to the holder of the power to select from among that class. There is no doubt, however, that the absence of a gift over is one consideration to be borne in mind in seeing whether there is really an intention to give to the class. The proper rule to be inferred from a perusal of the cases seems, therefore, to be as follows. Where it appears by the application of the ordinary rules of construction that a general intention is found in a will or other instrument to give to a class and a particular intention in favor of some of these, unascertained at the time, but to be ascertained by the selection by a particular person, as for example, a gift to A for life with a gift over to such of a class as A, shall appoint; then even though the particular intention may fail by reason of the power not being exercised still the general intention in favor of the class will be given effect to by the courts. In other words the trust must be found in the instrument and is not to be brought into existence by any technical rule of law.

A testatrix bequeathed to her husband a life-interest in certain real property, and gave "him power to dispose of all such property in

favor of our children." The will contained no gift over in default of appointment. There were children, but the husband died without exercising the power.

Held: that the husband had a mere power to exercise, that it was not one coupled with a trust, and that there was no gift to the children by implication and that the heir at law of the testatrix was entitled to the estate.

Company winding up—Effect of transfer of shares with the sanction of liquidator.

In re **National Bank of Wales.** Taylor, Phillips and Rickards Cases [1897, I, Ch. 298, C. A.]

Section 131 of the Companies Act, 1862, enacts that "all transfer of shares except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencenent of such winding up shall be void." This corresponds with S. 197 of the Indian Companies Act, VI of 1882. With reference to this section it was held by the Court of Appeal reversing the decision of *Vaughan Williams,* J. (1) that the power given to the liquidator in this section to sanction transfer of shares involved the power to alter the register of members; (2) that the final transferee alone was liable to be put in the list to contribute as a present member; and (3) that the transferor and all prior transferees were liable as past members.

The word 'share' in the section denotes not only rights but obligations also. When a member transfers his share he transfers all his rights and obligations as a shareholder in the Company as from the date of the transfer; he transfers his rights to future payments and his liabilities to future calls. The power given to the liquidator includes therefore not a power to sanction a transfer of benefits only but of the whole bundle of rights and obligations. Again, the words "or alteration in the status of the members of the Company" refer to some alterations other than transfers sanctioned by the liquidator, *i.e.*, transfers made before commencement of the winding-up and without the sanction of the liquidators, but not then registered.

Search warrant—Sufficiency of information.

Jones *v.* **German** [1897, I, Q. B. 374, C. A.]

In this case the plaintiff sued the defendant, a magistrate, for trespass to goods and wrongful imprisonment by the issual of a search warrant on

insufficient information. The information was to the effect that the complainant had reason to suspect and did suspect that his servant had in his possession some articles of his which he had packed in his boxes, that the servant was about to depart from the place under a notice to quit, and that he would not let his boxes be searched. The defendant thereon issued a search warrant, and some articles in the servant's possession were identified as the complainant's and the plaintiff was prosecuted. The prosecution was, however, afterwards withdrawn. The plaintiff now sued the magistrate for damages. The Court of Appeal confirming the decision of *Lord Russel of Killowen*, (*vide* 7 M. L. J., p. 48) held (1) that in an information for a search warrant it is not necessary to have an allegation that an offence had in fact been committed; (2) that it was not necessary to specify in the information the particular goods for which a search is desired; and (3) that the information in question was a proper one.

Criminal responsibility for acts of servants.

Collman *v.* **Mills** [1897, I, Q. B. 396, per *Wills*, J.]

The doctrine that the master is liable for all wrongful acts committed by his servant in the course of his employment has been extended in this case so as to make the master liable, not only civilly, but also criminally. We are afraid that this is rather an undue extension, especially when regard is had to the statute under which this conviction was sustained. The section of the statute runs as follows:—" An occupier of a slaughter-house shall not slaughter, or permit to be slaughtered, any animal within public view or within the view of any other animal." During the absence of his master, the licensed occupier of a slaughter-house, a servant of his in direct disobedience of the order of his master, and in order to save himself trouble, slaughtered a sheep in the yard in the presence of other sheep. The master was prosecuted for this act of the servant under the above section and convicted. Certainly by no ingenuity whatever can it be said that the master slaughtered the animal so as to make him criminally liable for slaughtering, and it is rather strange to say that a man permits the doing of a thing, the doing of which he has expressly prohibited.

Landlord and tenant, liability of—Dangerous condition of premises let.

Lane *v.* **Cox** [1897, I, Q. B., 415, C. A.]

The defendant let an unfurnished house of which he was the owner to a weekly tenant. There were no covenants to repair on the part of the landlord. The plaintiff came upon the premises at the request of the tenant to remove for the purpose of moving some furniture. While so employed he was injured owing to the defective state of the staircase in the house. The staircase was in this defective state at the time when the house was let. The plaintiff now sued the owner (the defendant) for damages.

Held: (Confirming the decision of the Lord Chief Justice) that the defendant was not liable.

In order that a person may be liable to another for negligence there must be a duty owed by him to the other, either under a contract or otherwise, and that duty must be neglected. Clearly there was no duty in this case between the plaintiff and the defendant under any contract, and there is no duty under the general law upon a landlord not to let an unfurnished house in a dilapidated condition to a tenant.

Contracts of Public servants—Implied warranty.

Dunn *v.* **Macdonald** [1897, I, Q. B., 401, per *Charles, J.*].

The defendant, a public servant of the Crown, was the Consul-General of the Niger Protectorate. While so employed he had engaged the services of the plaintiff on behalf of the Crown for a period of three years certain. The plaintiff was, however, dismissed within the term. He first sued the Crown for damages and was non-suited on the ground that the Crown had engaged him at its pleasure (*vide* 6 M. L. J., 65—1896, I, Q. B., 116, C. A.). He now sued the defendant on the ground that the defendant was liable for a breach of an implied warranty that he had authority to engage the plaintiff as a servant of the Crown for three years certain, in accordance with the doctrine laid down in *Collen* v. *Wright* (8 E. L. B., 64—7).

Held; by *Charles, J.*, that the doctrine that an agent who makes a contract on behalf of his principal is liable, on breach of it, to the other contracting party for a breach of an implied warranty of his authority to enter into the contract, is upon grounds of public policy, not applicable to persons in public employment of the Crown.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the following publications:—

The Harvard Law Review for April (*in exchange*).

The Albany Law Journal for April (*in exchange*).

The University Law Review for April (*in exchange*).

The Educational Review for April (*in exchange*).

The Calcutta Weekly Notes for April (*in exchange*).

State Library Bulletin for March 1897.

A Counsel defending:—"We propose to show, gentlemen of the jury," said counsel for the defence, in Judge Chetlain's court the other day, "that it is impossible for the defendant to have committed this crime.

"In the first place, we will prove that the defendant was nowhere near the scene of the crime at the time the crime was committed.

"Next we will offer the indisputable testimony of persons who saw the defendant on the spot and who did not see the defendant commit the crime.

"We will show that no poison was found in the body of the deceased.

"Not only that, but we will prove that it was put there by the prosecution in this case.

"We will, furthermore, show that the deceased committed suicide.

"And last, but not least, we will prove beyond the shadow of a doubt that the deceased is not dead.

"In view of which corroborative facts, gentlemen of the jury, we respectfully ask for an acquittal."—*The Albany Law Journal.*

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"*Not Considering Them.*—"I judge, then," said the lawyer, "that your conjugal relations are not happy."

"Well," answered the client, "some of my conjugal relations don't care two straws how me and my wife gets along, and others of them, particularly my wife's mother, just delights to see us quarrel. But I don't see as it's their business; and, you bet, if I make up my mind to

separate from my wife, I ain't goin' to ask whether my conjugal relations is happy or not!"—*The Albany Law Journal.*

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A witness's nationality.—Magistrate—What is your nationality?

Witness—Well, sir, my father was Irish, my mother was an American, and I was born in a Dutch brig sailing under French colors in Spanish waters.

Magistrate—That'll do, my man; you can stand down.—*The Albany Law Journal.*

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A witty answer.—Judge B—— fell down a flight of stairs, recording his passage in a bump on every stair, until he reached the bottom.

A bailiff ran to his assistance, and, raising him up, said:

"I hope your honor is not hurt?"

"No," said the judge, sternly, "my honor is not hurt, but my head is."—*The Albany Law Journal.*

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Co-respondent in Divorce Cases:—In *Saunders* v. *Saunders*, the Court of Appeal had to decide a question of great importance in divorce procedure—*viz.*, whether, when a petitioner can obtain no evidence against a man with whom his wife owns to having committed adultery, the Court can give him leave to proceed without a co-respondent. The cases are hopelessly contradictory, but last year Mr. Justice Barnes, with the concurrence of Sir Francis Jeune, laid down the rule that when adultery is alleged to have been committed with a man whose name and identity are known, and who is alive, the petitioner must make him a co-respondent, although he finds that evidence cannot be obtained which will prove the case against such co-respondent (*Jones* v. *Jones*, 65 Law J. Rep. P. 101; L. R. (1896) P. 165). In the present case Mr. Justice Barnes naturally followed his previous decision, which has now been reversed by a majority of the Court of Appeal. It is certainly a hardship to compel a petitioner to make a person a co-respondent against whom he has no evidence, so that he will run the risk of having to pay the co-respondent's costs. Therefore, on the whole, the judgment of the Court of Appeal seems the proper one when there is no reason to doubt the *bona fides* of the petitioner, and that all possible endeavours have been made to obtain evidence. Yet there are weighty reasons in favour

of the practice adopted by the present judges of the Probate Divison. It lessens the risk of collusion, and in one sense it is a benefit to the co-respondent, for it enables him to appear and, if he wishes it, deny on oath a charge which, though it is not formally made against him, must be mentioned in proving the wife's confession. As Lord Justice Smith agreed with the decision of Mr. Justice Barnes, in which he knew that the President of the Division concurred, we think it a matter of regret that the point has not been re-argued before the full Court of Appeal.—*The Law Journal.*

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A new trial owing to inefficiency of counsel:—In a recent case in the Cook County (Ill.) Criminal Court the defendant, who had been found guilty by a jury, was granted a new trial by the judge, on account of the inefficiency of the counsel who had defended him. This seems to be establishing a new principle, for the almost uniform tenor of the decisions is to the effect that neither ignorance, blunders nor misapprehension of counsel, not occasioned by his opponent, is reason sufficient for setting aside a judgment and granting a new trial. Any other course would, perhaps, be apt to lead to collusions and confusion in the administration of justice, and for this reason courts are strongly disposed to hold parties as bound by the acts of their attorneys in their behalf, in all cases where they are authorized to appear, and in which no fraud is shown, the client being left to his remedy against the attorney for negligence. There are a few reported cases in which the contrary has been held, the leading one being that of *State* v. *Jones* (12 Mo. App. 93), where the record presented such a lamentable example of ignorance and incompetency that the Court of Review held that the trial court should have afforded the remedy by setting aside the verdict and appointing a competent attorney to defend the prisoner. The Chicago Law Journal, in discussing the Cook county case, while conceding that the action of the judge may have done violence to technicality, nevertheless believes it tended to compass the ends of justice—and for such purposes are courts established and maintained.—*The Albany Law Journal.*

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The Law is no respector of persons.—That there are still some queer laws on the statute books of England was shown the other day, when an ex-chancellor of the exchequer was convicted at Bow street and fined because the chimney of a house he is at present occupying caught fire. The conviction was under section 23 of 28 and 29 Vict. c. 90, which provides that if the chimney of any house within the metropolis is on

fire the occupier of such house is liable to a fine of twenty shillings. No defense whatever seems to be available to the occupier if the fact of the fire be established. In this case the right honorable defendant had been only a very short time in occupation of the house, and it was shown that he had employed sweeps on this very chimney just before the fire, but he was mulcted, nevertheless. Although no defense is available to the occupier, it is provided that if he can prove that the fire was caused by the neglect or wilful default of some other person, he can recover the penalty he has had to pay summarily from such other person. In the case under consideration, however, there seems to be no such loophole of escape for the distinguished defendant. When an ex-cabinet minister is thus summoned to a police court, and fined, it may be conceded that in old England the law is no respecter of persons.—*The Albany Law Journal.*

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Torts—Joinder of Actions—Animals:—The Supreme Court of New Jersey decides, in *State* v. *Wood* (35 Atl. Rep. 654), that a joint action will not lie against the separate owners of dogs which unite in destroying the property of a third person. Each person is liable only for the damage done by his own dog, and not for that which is done by the dogs which do not belong to him. This rule applies to all cases of trespass by animals.—*The Albany Law Journal.*

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A Legal Laugh:—It has not been so very long since the old English court rules passed out of observance, and when they were in vogue nowhere were they observed more strictly than in South Carolina. A rule provided that a lawyer, when he spoke in court, must wear a black gown and coat, and that the sheriff must wear a cocked hat and sword. On one occasion a lawyer named Pettigrue arose to speak in a case on trial.

"Mr. Pettigrue," said the judge, "you have on a light coat. You cannot speak, sir."

"Oh, your honor," Pettigrue replied, "may it please the court, I conform to the law."

"No, Mr. Pettigrue," declared the judge, "you have on a light coat. You cannot speak, sir."

"But, your honor," insisted the lawyer, "you misinterpret. Allow me to illustrate. The law says that the barrister must wear a black gown and coat, does it not?"

"Yes," replied the judge.

"And does your honor hold that it means that both gown and coat must be black?"

"Certainly, Mr. Pettigrue; certainly, sir," answered his honor.

"And the law further says," continued Mr. Pettigrue, that the sheriff must wear a cocked hat and sword, does it not?"

"Yes, yes, Mr. Pettigrue," the court answered, somewhat impatiently.

"And do you mean to say, your honor," questioned Pettigrue, "that the sword must be cocked as well as the hat?"

"Eh? — er — h'm," mused his honor. "You — er — continue your speech, Mr. Pettigrue."—*The Albany Law Journal.*

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Going too far.—It was in an Irish court that a man was called into the witness-box not long ago, and being old and just a little blind, he went too far, in more than one sense, and, instead of going up the stairs that led to the box, mounted those that led to the bench. Said the judge, good-humoredly: "Is it a judge you want to be, my good man?" "Ah, sure, your honor," was the reply. "I'm an old man now, and mebbe it's all I'm fit for."—*The Albany Law Journal.*

An Unique Law School:—The Law School of the University of Buffalo is unique in one respect: the lecturers, with one exception, are active practitioners, and with four exceptions serve without compensation. The board comprises many of the ablest and busiest men in the city, and they make it a point to prefer their lecture engagement to professional business except when they are actually engaged in trials. The result is thus described in a recent circular issued by the Board of Control.

"In the course of the arguments at Albany it was discovered through the report of Mr. Franklin M. Dancher, Secretary of the State Board of Law Examiners, that of the seven law schools in the State, the Buffalo Law School stands at the head in point of standard; that in percentage of successful examinations taken for admission to the Bar, our school is first, and a larger proportion of our graduates are successful than of any school. This fact itself was a powerful argument against any proposed change in our system of instruction, and it indisputably established the truth that instruction is best secured from lawyers in the active practice of their profession.—*The Green Bag.*

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Lawyer's Fees :—Systems of remuneration are as various as the devision of legal functions. Our own system of fixing a scale of charges for each service is one which it is difficult to justify on any rational ground. It places a premium upon lengthy proceedings and is as unsatisfactory to the solicitor as to the client. A similar system, says Master MacDonnell, exists in Scotland, France, Holland, and Italy; but nowhere, except in colonies which have adopted procedure similar to ours, is an attempt made to separate the items of service with the minuteness to be found in an English bill of costs. In the United States there are, it appears, no scales of costs, and remuneration in contentious matters—according to Mr. Newton Crane, an English barrister and also a member of the Bar of the Supreme Court of the United States, who has contributed valuable information, nearly all the work for which an American lawyer is paid is contentious—is regulated entirely by special agreement, by *quantum meruit.* It follows that there is no such thing as taxation. If the client refuses, to pay, the lawyer must have his compensation settled in an action. As to the form of the bill, a separate item may be charged for each service, or a lump sum may be stated for professional services and disbursements. Every imaginable intermediate course, we are told, between these two extremes is also adopted. In America it is common with lawyers of good standing to stipulate that payment shall be contingent on results, though in European countries this, even where it is allowed, is considered bad form. Germany has, by an ordinance of 1879, amended in 1890, struck out a

line of her own in respect of costs. Fees proportionate to the value of the subject matter in dispute are allowed at certain definite stages in the cause—fee for action, fee for hearing, fee for evidence, and additional fee for hearing if there is a further hearing after the taking of evidence; and these cover all intermediate steps. From the examples given the fees appear to be very low. If a case is settled the lawyer receives the same fee as for the hearing. A singular feature in the German system is that court fees and expenses of witnesses and experts are paid in the first instance out of public funds, and are repayable by the party who is ordered to pay the costs. If he is insolvent, it is the public funds that suffer, not the successful suitor. In Denmark this generosity is carried to a step further, and the lawyer assigned to a person allowed to sue in *forma pauperis* is paid out of the public funds.—*The Solicitor's Journal.*

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